GUIDELINES FOR FINANCIAL ASSURANCE: (PART X-A), ONTARIO ENVIRONMENTAL PROTECTION ACT

Policy and Planning Branch
Ontario Ministry of the Environment
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GUIDELINES FOR THE APPLICATION OF FINANCIAL ASSURANCE REQUIREMENTS TO POLLUTION ABATEMENT PROGRAMS

1. Legislative Authority

Legislative authority for the requirement of financial assurance in association with Director's orders and approvals under both the Environmental Protection Act (EPA) and the Ontario Water Resources Act (OWRA) derives from Part X-A (Financial Assurance), Sections 119a-119f, of the Environmental Protection Act.

2. Statement of Principles

2.1 These Guidelines specify how financial assurance requirements are to be administered by the Ministry of the Environment.

2.2 Except for those activities for which financial assurance is required under other sections of the EPA, the requirement of financial assurance under Part X-A is discretionary on the part of the Director. However, these guidelines specify that assurance will be mandatory for certain activities. Criteria for requiring financial assurance for discretionary cases are given in these Guidelines.

2.3 These guidelines are intended to ensure that the administration of financial assurance requirements is consistent, equitable and effective.

2.4 The guidelines address the following topics:

- conditions when financial assurance may be required of the recipients of orders or approvals;
- the types of eligible financial assurance and the minimum requirements for depositing, accepting and releasing such assurance;
- review and reporting procedures that must be carried out when financial assurance is in force;
- conditions of a default;
- responses to a default.

2.5 Financial assurance will be required in order to:

- ensure that the terms of the order or approval are complied with;
- assemble funds for compensation, clean-up and rehabilitation at a future date.

2.6 Financial assurance may not be retained as a penalty.

2.7 Financial assurance will not normally be required of a public body or institution.

2.8 Financial assurance may be required for existing operations as well as new Orders or Certificates of Approval.

3. Definitions

3.1 Financial Assurance - means one or more of the mechanisms listed in Section 119a of the EPA by which one party guarantees or obtains a guarantee of its performance to another party (such as the Government).

3.2 Approval - as defined in Section 119a of the EPA.

3.3 Order - as defined in Section 119a of the EPA.

3.4 Regulated Party - the party which or person who, under an approval or an order, is subject to a prevention or an abatement requirement and must provide financial assurance.

3.5 Guarantor - a third party, such as an insurance company, which will issue an assurance or a surety bond.

3.6 Program Director - Ministry of the Environment official who is responsible for developing, issuing and enforcing the order or approval or a designate. Called the "Director" in the Ontario Environmental Protection Act and the Ontario Water Resources Act; may be a Regional Director or Director of the Environmental Approvals and Land Use Planning Branch. Directors employed by local boards of health and regional municipalities for purposes of contracts between the Minister and their employer under Part VII of the EPA are also Program Directors.

3.7 Environmental Measures - as defined in Section 119a of the EPA.

4. Activities for which Financial Assurance Is Required or Is Discretionary

4.1 Activities for which Financial Assurance is required in every case.

4.1.1 Approvals under Part V, EPA

4.1.1.1 private landfill sites
- for which a hearing is required under Section 30 of the EPA; or
- which will accept non-hazardous solid industrial, commercial or domestic wastes and which have a life-time capacity of 40,000 cubic metres or more (i.e. 1,500 people);

4.1.1.2 private transfer stations and waste processing sites for subject wastes as defined in Regulation 309,

4.1.1.3 private transfer stations and waste processing sites for other wastes where there is no identified place or practical method for final disposal in Ontario;

4.1.1.4 private waste management (haulage) systems which carry hazardous wastes.

4.1.2 Approvals under Part VII, EPA

4.1.2.1 All Class 4, 5 and 6 sewage systems designed to treat sewage other than sewage of domestic origin (i.e., other than human body waste, toilet and other bathroom waste, waste from showers and tubs, liquid or water borne culinary waste and sink waste).

4.1.3 Approvals under Section 23 and 24, OWRA

4.1.3.1 private communal sewage and water works in unorganized areas where there is no agreement with the Ministry of Municipal Affairs for it or a local government agency to take over the works in the event of a default,

4.1.3.2 private communal sewage and water works in organized areas without an agreement with the local government agency to take over the system in a default situation.

Note: The Ministry, at the time of initial approval in most cases, will continue to follow the practice of

requiring a municipality or other governmental organization to be prepared to take over the long-term operation and maintenance in the event of a default by the private operator of a communal water works, sewage works or sewage system, and that in unorganized areas, there be a commitment to create such an organization.

4.2 Activities for which Financial Assurance is discretionary.

4.2.1 Other Approvals under Part V, EPA

4.2.1.1 recycling operations;

4.2.1.2 organic waste disposal sites (e.g., canning plant wastes);

4.2.1.3 incineration facilities;

4.2.1.4 private transfer stations and waste processing sites for wastes other than those referred to in 4.1.1.2;

4.2.1.5 PCB storage sites;

4.2.1.6 waste management systems (haulers) which do not handle hazardous wastes.

4.2.2 Approvals under Part VII, EPA

4.2.2.1 septage holding lagoons;

4.2.2.2 all Class 4, 5 and 6 sewage systems serving either industrial, commercial or institutional facilities.

4.2.3 Approvals under Section 24, OWRA

4.2.3.1 industrial and milling activities that generate tailings, ash or other waste materials subject to Section 24, OWRA;

4.2.3.2 any operation which discharges into surface waters.

4.2.4 Air approvals under Section 8, EPA

4.2.4.1 storage of subject waste materials from air pollution control equipment;

4.2.4.2 Conditional Certificate of Approval requiring upgrading and where there is uncertainty as to whether the equipment will work.

4.2.5 Water Taking Permits under Section 20, OWRA

4.2.5.1 private undertakings which are likely to reduce the quantity or quality of water supplies of neighbours, and where conditions require remedial measures

4.2.6 Control and other Orders

4.2.6.1 industrial abatement programs under Section 17, EPA;

4.2.6.2 where an industrial or commercial site which is contaminated with hazardous materials is to be decommissioned;

4.2.6.3 operations which store subject wastes on site under Regulation 309 for more than 90 days.

4.3. The criteria for deciding when to require financial assurance in the discretionary cases are detailed in Section 5, below.

5. Conditions When Discretionary Financial Assurance May Be Required

5.1 Where a required action, process or task could result in adverse effects or damages to property owners, the public, or individuals who are not employees.

5.2 When a facility or operation will require decommissioning, rehabilitation or environmental clean-up measures when it is to be shut down or modified in the future.

5.3 When long term and/or perpetual management or monitoring of an existing or potential pollution or contamination problem is required by an order or an approval.

5.4 When there is reason to expect that the Regulated Party might become insolvent in the future and be unable to complete or comply with the conditions of an order or an approval.

5.5 When a Regulated Party or person has been convicted of violations involving pollution discharges or emissions for the specific problem that is being addressed in an order or approval.

5.6 When the Regulated Party has missed deadlines in previous orders or approvals.

5.7 When the Regulated Party receives an extension to a compliance date.

5.8 When the Regulated Party's operation or waste residuals are judged to be "high risk" in that the release of a contaminant could cause serious health, environmental or property damage.

6. Forms of Financial Assurance

6.1 Forms of financial assurance are described in Section 119a. These instruments are to be chosen by the Program Director and other MOE staff, in consultation with the Regulated Party, in accordance with these guidelines. Regulations may be made from time to time to require particular types and amounts of financial assurance in specific cases.

6.2 Examples of the instruments that can be used are presented in Appendix B.

7. Value of the Financial Assurance Required

7.1 The value of the financial assurance can be based on one or more of the following:

7.1.1 the estimated capital cost of each abatement item in the order or approval;

7.1.2 the expected operating costs of the relevant activity, facility or equipment (including long-term monitoring, treatment, storage or security) over the required period specified in the order;

7.1.3 the quantity of the waste materials being generated, processed, stored or discharged;

7.1.4 the estimated costs of cleaning up a potential spill;

7.1.5 the estimated capital and long-term operating costs (including monitoring, treatment, storage or security) of decommissioning a contaminated site or facility.

7.2 Where the order or approval indicates that there are several acceptable options or techniques to achieve the specified environmental requirements or objectives, the amount of the assurance can be based on the least-cost option or approach.

7.3 Procedures for calculating the amount of financial assurance for different types of activities are provided in Appendix A.

7.4 The Regulated Party who is either an applicant for an approval or the recipient of an order should provide estimates of the relevant activities and costs on which to base the financial assurance.

7.5 If annual operating costs are the primary cost associated with the approval or order, the value of the assurance is to be equal to the capitalized value (CV) of the annual operating cost, where

$$CV = c/i$$

where:

c = estimated annual cost

i = an approved annual interest rate

The objective of this assurance is to deposit or accumulate an amount that will generate annual income sufficient to cover these costs. The approved annual interest rate is to be provided by the Policy and Planning Branch in conjunction with the Financial and Capital Management Branch (FCMB).

7.6 The amount of assurance is to be 100% of the estimated capital costs or 100% of the capitalized value of the operating costs, except under the following conditions:

7.6.1 when a staged or phased program is approved for a period of 3 or more years, the amount of required financial assurance may be reduced as projects are completed;

7.6.2 where an approval or an order involving future decommissioning or rehabilitation, monitoring, treatment and disposal of effluents or emissions, or perpetual care and security requires the accumulation of

a financial assurance over time. This may be accomplished by an initial deposit which would be augmented by interest and/or annual payments.

7.7 If no estimates of the relevant capital or operating costs are provided by the Regulated Party, MOE staff can generate estimates using relevant procedures found in Appendix A.

7.8 If estimates are provided by the Regulated Party, they can be verified using the procedures found in Appendix A.

7.9 If there is a disagreement between the cost estimates of the MOE and those of the Regulated Party, a Report may be prepared by the Regulated Party in accordance with paragraph 1.2 of Policy 05-02 of the Manual of Environmental Policies and Guidelines. Estimates of the capital and/or operating costs of the required actions that are derived from this report will then be used as a basis for determining the amount of assurance required.

7.10 Where an approval or order involving future decommissioning, rehabilitating, monitoring and treatment of effluents or emissions, or perpetual care and security requires the accumulation of financial assurance over time, the payments, or the formula for calculating payments into the fund, shall be established in accordance with any relevant Regulations or procedures for determining the amounts and should be specified in the order or approval.

7.11 The order or approval should provide for the periodic review of financial assurance provisions in order to ensure that adequate funds are available for the specified requirements.

7.12 Where marketable and/or other securities not covered by section 12 are held, consideration should be given to requiring securities with current market value 10-15% in excess of the basic amount required. This premium is intended to offset the need to obtain additional financial assurance if the market value of the securities declines.

8. Negotiating Financial Assurance Requirements

8.1 Financial assurance agreements and/or requirements for specific polluters may be developed by the following Ministry personnel or their designates:

8.1.1 the Program Director;

8.1.2 the Director of the Financial and Capital Management Branch.

8.2 Advice from an economist from the Policy and Planning Branch, a solicitor from the Legal Services Branch, technical personnel from Waste Management, Water and Air Resources Branches or from other agencies, such as the Ministry of Financial Institutions, may be provided.

8.3 Where negotiations are to take place between the Ministry and the Regulated Party, meetings and other direct contacts with the Regulated Party

should be arranged by or through the Program Director.

8.4 If the Regulated Party or some other interested party claims that provision of the financial assurance will cause unemployment or undue financial hardship, an economic or financial analysis will be carried out in accordance with Policy 02-01 of the Manual of Environmental Policies and Guidelines.

8.5 Procedures for administering the following forms of financial assurance are presented in the subsequent sections:

8.5.1 cash (See Section 9 below),
8.5.2 letters of credit (See Section 10 below),
8.5.3 surety/performance bonds (See Section 11 below),
8.5.4 Government of Canada or provincial bonds (See Section 12 below),
8.5.5 agreements as required by an approval, order or regulation. (See Section 13 below).

9. Procedures for Administering Cash Guarantees

9.1 Cheques made out to the Treasurer of Ontario should be submitted to the Director of the Financial and Capital Management Branch (FCMB) of the Ontario Ministry of the Environment.

9.2 The cheque will then be deposited into an interest-bearing trust fund within the Consolidated Revenue Fund. The interest credited to the fund shall be at the rate offered at that

time by the Province of Ontario Savings Office to its "Trillium Account" depositors in accordance with Order in Council dated March 26, 1987.

9.3 If cash sums are to be built up through payments over time, payments may be based on a per-unit price (e.g. $ per tonne of waste) or an "amortization" payment calculated to accumulate to a total amount by a specific time.

9.4 In appropriate cases, such as the establishment of a new waste disposal site, if the cheque is not certified, the relevant approval should not take effect until the cheque has cleared the bank.

9.5 Applications for refunds are processed through the Program Director to the Director of the FCMB.

9.6 Payments from these trust funds for any reason shall be requested by the Program Director, arranged by the Director, FCMB and authorized by other MOE officials having appropriate payment authority.

9.7 The FCMB shall maintain records of all trust funds and issue reports regularly as required by Central Agencies and Ministry Management. Reports on each account should include, at a minimum, the following:

- payments into and out of each account,
- accrued interest,
- opening and closing balances.

(See also Section 14.3)

10. Procedures for Administering Letters of Credit

10.1 Only irrevocable letters of credit from an approved Chartered Bank with an office in Ontario will be accepted. A list of approved institutions will be maintained by FCMB.

10.2 Letters of credit and other supporting documents are to be delivered to the FCMB for safe-keeping in accordance with the Manual of the Office of the Treasury. Copies should be kept in current district regional and approvals files.

10.3 A letter of credit may specify an expiry date. Where security is required for a longer period, the letter of credit should state that it will be renewed automatically.

10.4 A renewable letter of credit may provide that it may not be renewed if the Crown advises the bank in writing that renewal is not required. It should provide that the issuing bank must give notice to the Crown, at least 60 days before the expiry date, that the letter of credit will not be renewed.

10.5 If notice not to renew a letter of credit is given by the bank, alternative security satisfactory to the Program Director and the Director FCMB, must be posted at least 30 days before the expiry date.

10.6 If alternative financial assurance is not posted as provided in Section 10.5 or notice not to renew a letter of credit is given with no alternative security posted, the letter of credit is to be called and the proceeds, if not already expended,

are to be administered as a cash guarantee as set out in Section 9 of these Guidelines.

10.7 Any approval or order should provide that, where non-cash assurance (e.g., letter of credit, surety bonds, agreements, etc.) is provided and appropriate arrangements are not made for its renewal or replacement, then cash assurance shall be immediately posted in lieu of the non-cash instrument. (see also Section 15.5)

10.8 The FCMB shall maintain records of all letters of credit and prepare reports annually, or more frequently, as required by Central Agencies and requested by the Ministry. (see also Section 14.3)

10.9 The Program Director is to review FCMB reports on letters of credit and instruct FCMB whether or not to call expiring letters of credit if they are not renewed.

10.10 As obligations under an order or approval become fulfilled, the Director of the FCMB will notify the bank by letter as to the status of the obligation; e.g., whether the amount of the letter of credit is to be reduced, or that the letter of credit is to be released. If it is to be released, the original letter of credit and any required supporting documents are to be returned to the bank.

10.11 Drawings on letters of credit, payments into the Consolidated Revenue Fund, reductions or releases in letters of credit are to be authorized by the Program Director and the Director of the FCMB, with further authorization obtained as necessary. In

the absence of any Director, an Executive Director or an Associate or Assistant Deputy Minister can authorize action.

10.12 The Regulated Party is responsible for all bank fees and charges associated with the letter of credit.

11. Procedures for Administering Surety/Performance Bond Agreements

11.1 Surety and Performance Bonds consist of agreements or contracts among the Guarantor, the Regulated Party and the Crown and are to be negotiated by the personnel specified in Sections 8.1 and 8.2. Advice may be obtained from the Insurance and Risk Management Branch of the Ministry of Government Services and the Office of the Superintendent of Insurance.

11.2 Original copies of Surety and Performance Bonds, agreements, contracts and any other relevant documentation should be delivered to the FCMB for safekeeping, with copies retained by the Program Director.

11.3 The FCMB shall keep records of these documents and provide reports on them annually, or more frequently, as required by Central Agencies and the Ministry management. (see also Section 14.3)

11.4 Release of these documents may be authorized by the Program Director and the Director of the FCMB, with further authorizations obtained as necessary.

11.5 The Regulated Party is responsible for all fees and charges involved in establishing the Bond or other Agreement.

12. Procedures for Administering the Use of Eligible Government Bonds as Financial Assurance

12.1 In this Section "bonds" are debt instruments issued or guaranteed by the Government of Canada or a Provincial Government and should be distinguished from surety or performance bonds.

12.2 Bonds used as a financial assurance should have a maturity date not over 3 years from the date on which they are deposited.

12.3 Bonds must be in bearer form or they must be transferred to the Government of Ontario. Consequently, Canada Savings Bonds cannot be used as financial assurance.

12.4 Bonds are to be delivered to the FCMB for safe keeping.

12.5 The FCMB is to keep records of bonds that are held and report on them annually, or more frequently, as required by Central Agencies and Ministry Management. (see also Section 14.3)

12.6 The FCMB should take steps to monitor the value of the bonds and report to the Program Director if the value falls below the required value of the financial assurance.

12.7 If the value of the bonds on deposit falls to a level of less than 85% of the required value of the financial assurance, the Program Director is to inform the Regulated Party that it must provide additional security.

12.8 The Program Director, in conjunction with the FCMB, may make arrangements with persons posting bonds to accept substitute bonds as security. If no other arrangements are made and a bond matures or interest payments are received, the proceeds shall be deposited and administered as a Cash Guarantee as per Section 9 of these Guidelines.

13. Agreements With Terms Specified in the Approval, Order or Regulations

13.1 Agreements or contracts for financial assurance may be required by a term or condition of an approval or an order.

13.2 The wording of the agreement may be negotiated in the course of developing the approval or the order.

13.3 Copies of the agreement and the approval or order should be filed with the FCMB for safe-keeping and reference.

13.4 The FCMB shall keep records of these agreements and provide reports on them annually, or more frequently, as required by Central agencies and Ministry Management. (see also Section 14.3)

13.5 Where the agreement provides for holding of securities by a third party, the relevant provisions of the other sections of these Guidelines shall apply. For example, Section 12.6 describes how government bonds are to be held.

14. Periodic Reviews

14.1 In addition to the reporting and reviews specified in previous paragraphs, the following types of reviews of each financial assurance should be undertaken as often as is necessary:

14.1.1 The FCMB should make inquiries at least once a year as to the status and solvency of the persons and institutions that provide financial assurance to the Superintendent of Deposit Institutions or the Superintendent of Insurance in the Ontario Ministry of Financial Institutions or to the Canadian Inspector General of Banks;

14.1.2 The amount of the financial assurance should be reviewed by the Program Director to ensure that the assurance is sufficient to cover any increases in expected capital and/or operating costs or other program requirements.

14.2 The use of Government bonds and debt instruments as assurance for a period longer than 3 years is not encouraged. The value of these instruments will fluctuate according to economic conditions. Where they are used, it will be necessary to monitor the

value of the instrument, to compare this value against the expected amount of money that will be required in the future for decommissioning or clean-up and to require the deposit of additional assurance if necessary.

14.3 For each order or approval that has a financial assurance requirement, a copy of the following is to be sent to the FCMB for retention as a precedent or referral resource:

- the front page of the order or approval;
- the signature page or pages;
- the pages containing all assurance provisions and requirements.

15. Conditions Contributing to a Default

15.1 Any violation of a specific order or approval (including any other order or statute) can be specified to be a default.

15.2 Specific conditions contributing to a default should be carefully specified in the order or approval, e.g.:

15.2.1 The Regulated Party misses two successive deadlines in his compliance schedule;

15.2.2 After one half of the time allotted to the implementation of the environmental measure has expired and the Regulated Party can provide no evidence that steps are in progress to comply with the terms of the order or approval;

15.2.3 How long an industry or other regulated activity stays closed on a "temporary" basis before it must commence permanent rehabilitation should be negotiated beforehand with the Regulated Party.

15.3 There are other types of occurrences which may trigger the need to convert a documentary financial assurance into cash or secure additional documentary financial assurance. For example:

15.3.1 Notice is received of a proposed cancellation or non-renewal of a letter of credit or of some other form of financial assurance;

15.3.2 Notice is received of the impending insolvency of the Regulated Party or the Surety.

15.4 Documentation specifying the circumstances of the default should be prepared by the Program Director within two weeks of determination of a default. Copies of such documentation are to be sent to the Director, FCMB and the Executive Director, Corporate Resources Division.

15.5 The Investigations and Enforcement Branch should be advised of any failure to deposit required financial assurance or of premature expiry of a financial assurance where satisfactory alternative arrangements have not been made.

16. Responses to a Default

16.1 If the financial assurance has been given in bonds, a letter of credit, or similar security, all or part of the financial assurance amount may be claimed by the Program Director (with the appropriate authorization) and the proceeds transferred to the Consolidated Revenue Fund. Any interest that has been earned on this money will accrue to the amount of the financial assurance.

16.2 Where financial assurance or its proceeds is to be used to complete the action, facility or environmental measure as specified in the order or approval, a director's order is required to authorize such expenditure. This order can be appealed.

16.3 The order or approval which requires posting of the financial assurance should normally specify the purposes to which the financial assurance can be applied. In some cases (e.g. waste site approvals), it may be appropriate, in addition to specifying particular applications or uses to state that the financial assurance may be used to remedy a breach of any requirement with respect to the waste disposal site imposed now or in the future by or under the Environmental Protection Act or the Ontario Water Resources Act.

16.4 If the financial assurance is a surety or performance bond, or other type of agreement that is not readily convertible to cash, the provisions of the agreement that is part of a surety or performance bond will apply. This may include hiring, by the Ministry, of a different contractor to carry out or complete the required works.

16.5 Where facilities or sites are abandoned, financial assurance will be expended on required decommissioning, clean up and other necessary tasks.

16.6 Where it is not feasible to utilize outside contractors to complete required environmental works or measures as required by the order or the approval (e.g. where access cannot be gained to an abatement facility or where compliance requires a process change within a manufacturing plant), the Ministry shall realize on the assurance and withhold any funds until compliance is achieved. In the meantime, other enforcement actions and sanctions (e.g. prosecutions) may be applied.

17. Non-Ministry Directors

Where a Program Director is employed by a local board of health or regional municipality, the Program Director should contact a Ministry of the Environment Regional Office or the Ministry Legal Services Branch to develop financial assurance requirements. This consultation will ensure consistency in application and the wording of financial assurance forms and conditions. The requisite notification and copies of relevant documents should be sent to the Finance and Capital Management Branch as specified in Section 13 of these Guidelines.